

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C.

JUN 1 3 00 PM '91

RECEIVED

JUN 1 3 00 PM '91

JUN 28 1991

In re Application of
THE FIDELIO GROUP, INC.

For a construction permit
for a new FM station on
Channel 282B (104.3 MHz)
New York, New York

)
)
)
)
)
)
)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

File No. BPH-910502MQ

To: Chief, Mass Media Bureau

**RESPONSE TO
REPLY TO OPPOSITION TO REQUEST FOR RETURN OF
APPLICATION AS UNACCEPTABLE FOR FILING**

The Fidelio Group, Inc. ("Fidelio"), by its attorneys,
submits this Response to GAF Broadcasting Company, Inc.'s
("GAF") "Reply to Opposition to Request For Return of
Application as Unacceptable for Filing," dated June 24, 1991
("GAF Reply"). 1/

GAF makes two unsupportable assertions in its Reply:
1) that Fidelio's Application is not a "time critical" filing
and therefore does not qualify for the Commission's extra day
rule for Pittsburgh filings; and 2) that the Commission's
back-up procedures are a mandatory predicate to the extra day
rule. Neither argument withstands the plain language of the
Commission's Order on the subject.

1/ Information filed concurrently. Fidelio is requesting leave

The Commission's Memorandum Opinion and Order, Establishment of a Fee Collection Program, 5 FCC Rcd 3558 (1990) ("MO&O"), established the definition of "time critical" applications: "those requests [that were previously filed in Washington] for FCC authorizations that must be filed by a specific deadline or be dismissed as untimely." Id. at 3564 [¶ 13]. The MO&O elaborated on the definition, by referring to "applications filed in response to a 'window' or a 'cut-off' list established by the Commission." See id.

Here, Section 73.3516(e) of the Commission's Rules establishes the "window" period. If a competing application is not filed by the end of this "window" -- that is, by the "cut-off" date -- it will be dismissed as untimely. See, e.g., Spanish International Communications Corporation, 2 FCC Rcd 3336, 3337 [¶¶ 4, 5] and 3342 n.6 (1987) (noting that no "window" had opened for applications mutually exclusive with renewal applications since initial opening of "windows" and explaining that "cut-off dates" for competing applications are set by Section 73.3516(e) for timely filed renewal applications) (subsequent history omitted); Faith Center, Inc., 99 FCC2d 1164, 1167 [¶ 6] (1984) ("window" for competing applications against renewal applications not opened in this instance because prior renewal in hearing status) (subsequent history omitted).

Because the Commission's time critical definition so clearly encompasses competing applications such as Fidelio's, GAF deliberately adds its own, imagined gloss. Without attribution, GAF embroiders the word "special" into the Commission's definition. See GAF Reply at 5. But that imprecise qualifier is, clearly, a figment of GAF's imagination. 2/

GAF has it wrong. Given the Commission's long-standing application of the terms "window" and "cut-off" to applications such as Fidelio's that are mutually exclusive with renewal applications, 3/ and the plain language of the MO&O granting an extra day for such time critical filings, there would be insufficient notice only if the Commission now changed its policy and returned Fidelio's application as untimely. Cf. GAF Reply at 6 (asserting notice would be

2/ GAF makes another unsupported leap when it claims that applications filed in response to "irregular" windows are "deemed time-critical" because those applicants are afforded little advance warning. See GAF Reply at 5. That is nonsense. Applications are "deemed time-critical" once they meet the Commission's express definition. The actual Commission definition of time critical -- those applications that would be dismissed if not filed by a specific date -- makes no allusion whatsoever to the amount of forewarning of the deadline.

3/ See supra, Spanish International Communications Corporation; Faith Center, Inc.

necessary to "change" extra day rule to include applications that are mutually exclusive with renewals).

GAF's lengthy dissertation on the supposed necessity of filing a back-up copy of a time critical application in order to obtain the extra filing day is equally unavailing. See GAF's Reply at 6-10. Notwithstanding GAF's disingenuous conversion of the Commission's "may" into "must," the back-up procedure is a purely voluntary option. 4/ The Commission concluded in its MO&O that "[i]n any case in which the application transmitted to Pittsburgh is lost or delayed, and the filer has availed itself of the date stamp/receipt option, the Secretary's date stamped copy will provide evidence that the filing was made or was made in a timely fashion." Id. (emphasis added). Fidelio's application was not lost or delayed -- it was timely received by the Mellon Bank on May 2,

4/ The Commission repeatedly emphasized the permissive nature of this back-up procedure: the Commission explained that an unofficial back-up copy "may be submitted to the Commission" and that such copy then "may be used as evidence of timely submission should the official copy be lost or delayed." MO&O, 5 FCC Rcd at 3565 [¶ 14] (emphasis added). The only use of the word "must" is in discussing steps that "must" be undertaken once the applicant chooses to avail itself of this voluntary insurance policy.

1991 -- so that the voluntary back-up procedure is entirely irrelevant. 5/

It is unfortunate that GAF has chosen to inaugurate this proceeding by filing a misleading Request that purposely ignored the Commission's applicable MO&O, and to compound that initial impropriety by filing a Reply that substitutes, without attribution, GAF's own language for that of the Commission. GAF's strategy is objectionable and its pleadings are without merit. 6/

5/ GAF spends much effort setting up a straw man in order to knock it down. Specifically, GAF imagines that Fidelio had suggested in its Opposition that, while the MO&O had made the back-up procedures mandatory, the May 9, 1990 Public Notice then made them permissive. See GAF Reply at 7. Fidelio most assuredly did not suggest this "change" from the MO&O to the Public Notice. To the contrary, Fidelio noted the consistency between the MO&O and the Public Notice on the voluntariness of the back-up procedure. See Opposition at 4 n.6. Contrary to GAF's argument, there has been no change or lack of notice -- the MO&O itself established the back-up procedure as an "option." See MO&O, 5 FCC Rcd at 3565 [¶ 14].

6/ GAF's interpretation of Section 1.4 (see GAF Reply at 1-2) is as novel and unsupported as its re-writing of the extra day policy. Consistent with the language of Section 1.4(h) and (i), established practice before the Commission, and informal confirmation by the General Counsel's Office on prior occasions, Fidelio's Opposition was filed three additional non-holiday days after it would have been due had GAF hand-served its Request. Section 1.4(h) provides that "an additional 3 days (excluding holidays) will be allowed for filing a response." Under GAF's mistaken interpretation, Fidelio would have been granted only two additional non-holiday days for its filing. GAF's citation to Section 1.4(e)(3)

[Footnote continued]

For the foregoing reasons and the reasons previously stated, GAF's Request should be rejected and Fidelio's Application should be processed as timely filed.

Respectfully submitted,

THE FIDELIO GROUP, INC.

By: 
Mace J. Rosenstein
Marissa G. Repp

HOGAN & HARTSON
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109
(202) 637-5877

Its Attorneys

June 28, 1991

1179r/5971o

6/ [Footnote continued]

likewise is mistaken. The definition of "filing period" is relevant only to the determination of which documents are afforded extra time for mail service, not when the first extra non-holiday day is counted. (That is, if the document is the type for which the unexpanded filing period equals 10 days or less, then that document qualifies for three more non-holidays for filing.)

CERTIFICATE OF SERVICE

I, Vincent J. Summa, a Legal Secretary with the law firm of Hogan & Hartson, hereby certifies that on this 28th day of June, 1991, I caused to be placed in the United States mail, first class, postage prepaid, a copy of the foregoing "Motion for Leave to File Response" and "Response to Reply to Opposition to Request for Return of Application as Unacceptable for Filing" addressed to the following:

Robert L. Pettit, Esquire */
General Counsel
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, DC 20554

Roy J. Stewart, Esquire */
Chief
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 314
Washington, DC 20554

Stuart B. Bedell, Esquire */
Assistant Chief
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 302
Washington, DC 20554

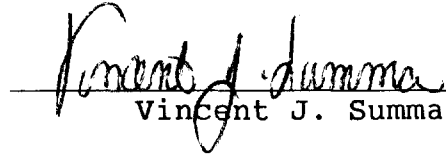
Aaron I. Fleischman, Esquire
Arthur H. Harding, Esquire
Steven A. Lancelotta, Esquire
Fleischman and Walsh, P.C.
1400 Sixteenth Street, N.W.
Suite 600
Washington, DC 20036

and

John T. Scott, III, Esquire
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Counsel to GAF Broadcasting Company, Inc.

*/ By Hand Delivery

Morton L. Berfield, Esquire
Cohen & Berfield, P.C.
Board of Trade Building
1129 Twentieth Street, N.W.
Washington, DC 20036
Counsel for Class Entertainment and
Communications, L.P.



Vincent J. Summa

1087r